



Written by [C. Mitchell Shaw](#) on April 24, 2016

## Court Rebukes, Then Excuses, FBI, NSA Excesses

The U.S. Foreign Intelligence Surveillance Court (FISC) last week made public its November 6, 2015 opinion expressing that it was “extremely concerned” about the failure of both the FBI and the NSA to “comply with its minimization procedures.” The Office of Director of National Intelligence responded by saying that it was an accident and officials did not mean to “leave the FISC with a misimpression or misunderstanding.”



As the bloated surveillance state continues to grow, the American people are constantly told there is little to worry about because the ubiquitous surveillance is checked by the FISC. Now — as if an illustration was needed — it is clear that even that scant (and secret) oversight is being skirted.

The NSA is supposed to delete the data it vacuums up after either two or four years (depending on the type of data). It turns out, though, that the agency is keeping much of that data beyond its expiration date. As *Politico* [reported](#):

The NSA said in some cases it needed the data to prevent future incidents where data was accidentally collected without legal authority, like when a surveillance target enters the U.S. (At that point, officials are supposed to seek a more specific court order to continue the surveillance.) However, that wasn't the case with all of the old data NSA was hanging onto.

There are at least two disturbing elements here: The NSA “accidentally collected [data] without legal authority” and then because “it needed the data to prevent future incidents,” it kept it. Longer than it was allowed. Without legal authority.

Never mind the veneer-thin excuse that the illegal data was “accidentally” collected in the first place. The NSA still chose to keep the data, and then the Office of Director of National Intelligence said, “The Government has informed the Court that there was no intent to leave the FISC with a misimpression or misunderstanding, and it has acknowledged that its prior representations could have been clearer.”

So, because officials didn't *mean* to break the law and then lie about it, it's no big deal. After all, everybody makes mistakes.

The FBI is required to purge surveillance records of data that would violate attorney-client privilege. In cases where conversations between defendants and attorneys are scooped up, the FBI is supposed to have “such surveillance reviewed by a ‘taint team’ that can excise any legal communications, but that was not happening in all cases,” according to the report by *Politico*.

This is not the FBI's first time playing that game, either. In 2014, the FBI made the court aware that there were “some instances” of failure to follow those procedures. Foreign Intelligence Surveillance Court Judge Thomas Hogan — the Reagan appointee who wrote the [recently released opinion](#) — said, “The government generally attributed those instances to individual failures or confusion, rather than a ‘systematic issue.’” It turns out that “systematic” would be the perfect word to describe this issue. Incidents continued to occur even after the FBI's disclosure to the FISC in 2014, leading Hogan to write, “The Court was extremely concerned about these additional incidents of non-compliance.”



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It is difficult to believe that “there was no intent to leave the FISC with a misimpression or misunderstanding.” It looks more as though the FBI and NSA live by the maxim, “It’s easier to get forgiveness than it is to get permission.” And, sadly, that may be the case — at least in this instance. While issuing a strong rebuke in the form of his opinion, Hogan seems also to have accepted the ridiculous notion that *this time, the surveillance hawks really have learned their lesson*. From the report by *Politico*:

At a closed hearing last October, the FBI detailed some procedures set up to remedy the problem, including additional training and a system to remind agents when such reviews are needed. Hogan said he was “satisfied” that the FBI was “taking appropriate measures” to address the issue. However, he said he “strongly encourages” the government to find any other such mistakes and he said he wanted a briefing on those efforts earlier this year.

Well, that’ll teach them! I’ll bet that slap on the wrist really smarts.



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